

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEW JERSEY

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4 ASSOCIATION OF NEW JERSEY
5 RIFLE & PISTOL CLUBS, INC.,
6 PLAINTIFF

7 Vs.

CIVIL NO.
18-10507 (PGS)

8 GURBIR GREWAL, et al,
9 DEFENDANTS

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JULY 12, 2018

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CLARKSON S. FISHER COURTHOUSE
402 EAST STATE STREET
TRENTON, NEW JERSEY 08608

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B E F O R E:

THE HONORABLE PETER G. SHERIDAN
U.S. DISTRICT COURT JUDGE
DISTRICT OF NEW JERSEY

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20 **HEARING ON PLAINTIFF'S APPLICATION FOR PRELIMINARY INJUNCTION**

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Certified as true and correct as required
by Title 28, U.S.C. Section 753

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/s/ Francis J. Gable
FRANCIS J. GABLE, C.C.R.

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1 THE COURT: So this is the Association of New Jersey
2 Rifle and Pistol Clubs, Inc., et al, versus Attorney General
3 Grewal and others. So, could we enter appearances? We'll
4 start with the plaintiff.

00:00

5 MR. SCHMUTTER: Good afternoon, your Honor, Daniel
6 Schmutter from the firm of Hartman and Winnicki for
7 plaintiffs, and may I present my pro hac vice counsel from the
8 District of Columbia law firm Cooper and Kirk David Thompson
9 and Peter Patterson.

00:00

10 MR. THOMPSON: Good afternoon, your Honor.

11 THE COURT: Good afternoon, Mr. Schmutter, Mr.
12 Thompson and Mr. Patterson.

13 And for the defendant?

00:00

14 MR. WARNER: Good afternoon, your Honor, Assistant
15 Attorney General Joe Fanaroff on behalf of the defendants, and
16 with me are Deputy Attorney General Bryan Lucas and Deputy
17 Attorney General Valeria Dominguez.

18 THE COURT: Good afternoon, Mr. Fanaroff, Mr. Lucas
19 and Ms. Dominguez.

00:00

20 MS. ALAMPI: Good afternoon, your Honor, Jennifer
21 Alampi from the law firm of Alampi and De Marrais for Chief
22 James B. O'Connor in his official capacity as Chief of Police
23 for the Township of Lyndhurst.

24 THE COURT: Good afternoon, Ms. Alampi.

00:01

25 MR. JONES: Good afternoon, your Honor, George Jones

1 from McElroy, Deutsch, Mulvaney and Carpenter representing
2 defendant Thomas Williver.

3 THE COURT: Good afternoon, Mr. Jones.

4 So, I had a pre-hearing conference with the parties,
5 and we discussed how we were going to proceed on this matter.
6 Does anyone issue wish to report on that, or do you just wish
7 me to do it? I might as well do it.

8 So, my view of was after I read all the papers that
9 a hearing with witnesses would be better than hearing just
10 oral argument today. So I postponed the application for the
11 preliminary injunction until August 13th, 14th and 17th when
12 we'll have a hearing. And then after that period of time it
13 will be one week to August 24th when I receive briefs from the
14 parties, and thereafter I'll make a decision.

15 And I believe everybody agreed to that; right?

16 (Counsel say yes.)

17 THE COURT: So I have no objections to that. It was
18 my thought, this is a rather substantial dealing with a
19 provision in state law, so the Court should consider it very
20 carefully. And I thought a hearing as opposed to just briefs
21 and certifications would be a better way to get a handle on
22 all the facts that may be in controversy. So it just seemed
23 from my standpoint that was a better way of going about doing
24 it. So we'll proceed with that.

25 While we were in there, counsel indicated that they

1 would like to make some preliminary remarks about the case and
2 arguments, and I have agreed to that. I believe 15 minutes
3 each side? All right. So we'll start with the plaintiffs.

4 MR. PATTERSON: Thank you, your Honor. It's Pete
5 Patterson for the plaintiffs. And I'll just start out by
6 sketching the purely legal reasons why we think we are not
7 only likely to success on the merits, but in fact do succeed
8 on the matters in this case based on what's before the Court.

9 Starting with the Second Amendment, in the *District*
10 of *Columbia v. Heller*, the United States Supreme Court said
11 that the Second Amendment elevates above all other interests
12 the right of law-abiding responsible citizens to use arms in
13 defense of hearth and home. And the court also established
14 the test for determining which arms law-abiding citizens are
15 responsible to use, and that test is whether those arms are in
16 common use by law-abiding citizens.

17 And here it is absolutely clear that the magazines
18 New Jersey has banned, inaccurately called large capacity
19 really standard capacity magazines, are in common use. The
20 evidence shows there 133 million of them. Even if there's
21 some, you know, margin around the edges of that Justice Alito
22 in his *Caetano* concurrence said that stun guns were in common
23 use because there were approximately 200,000 of them owned by
24 Americans. So it's not even anywhere or orders of magnitude
25 above that. There's evidence from -- you know, that these are

1 sold standard with many of the most common firearms in the
2 nation.

3 So the fact that they're commonly possessed by
4 law-abiding citizens, it follows from that under *Heller* that
5 law-abiding citizens are entitled to possess them. And the
6 ban on their possession is flatly unconstitutional.

7 Now, to be sure there have been three -- three or
8 four Court of Appeals decisions that have gone the other way
9 on this issue, but respectfully they have all not complied
10 with *Heller*'s reasoning; and in fact the author of *Heller*
11 joined a dissent from denial of certiorari in one of those
12 cases, saying that it the not comply with *Heller*. So it's
13 pretty clear that they've gone astray and I can run through
14 them quickly.

15 So first we have the DC Circuit panel decision
16 there, accepted that these magazines are protected by the
17 Second Amendment; but nevertheless held by applying an
18 intermediate scrutiny balancing test that the state could
19 still ban them. Judge Kavanaugh in a compelling and
20 convincing dissent in that case, explained why that's flatly
21 contrary to *Heller*, and indeed employed the same methodology
22 that Justice Breyer did in dissent in *Heller* essentially.

23 So, *Heller* makes clear -- and we're not taking issue
24 -- we know the Third Circuit has applied levels of scrutiny
25 analysis in Second Amendment cases, but if *Heller*'s clear

1 about anything it's that when it's a ban on commonly possessed
2 arms that reaches into the home, that fails any stayed of
3 scrutiny is what *Heller* says. So it follows directly from
4 that.

00:06

5 THE COURT: So when you use the word ban, that's
6 different than some regulatory limitation; right?

00:07

7 MR. PATTERSON: Yes, absolutely. And one thing --
8 you know before I go further I wanted to emphasize what's
9 distinct about this case from these other Court of Appeals
10 cases, is there they weren't dealing with the issue of moving
11 from a 15-round limit to a 10-round limit; that's what New
12 Jersey has to defend. There's absolutely no evidence that
13 somehow the 10-round limit is going to be better than the
14 15-round limit. So that right there distinguishes it from all
15 these other cases.

00:07

16 So moving along from the DC Circuit, the next was
17 the Seventh Circuit in *Friedman* which applied an idiosyncratic
18 test that the court came up with that no other court has
19 applied and that every factor of that test is directly
20 contrary to *Heller*. For example, one of them whether the arms
21 were in existence at the founding; *Heller* made clear that's
22 not the right question, the question is whether they're in
23 common use now by law-abiding citizens. So that was directly
24 contrary to *Heller*.

00:07

00:07

25 Then came the Fourth Circuit in the *Kolbe* case, and

1 that case held that the magazines aren't protected by the
2 Second Amendment because in the court's judgment, contrary to
3 the tens of millions of Americans that own these magazines,
4 they were most useful in warfare. But that again is directly
5 contrary to *Heller*, which the test is not whether arms are
6 most directly useful in warfare under the judiciary's
7 conception, it's whether law-abiding citizens use them for
8 lawful purposes.

9 And *Heller* to be sure said that machine guns and the
10 like it's possible may be banned, but that was not because of
11 some analysis of their military utility, it was because of the
12 *Heller*'s conclusion that they're not in common use. And
13 *Heller* had to defend that because that puts the right in some
14 tension with its purpose which is to protect the militia. So
15 the Fourth Circuit turned that on its head and established a
16 test that's directly contrary to the meaning and purpose of
17 the Second Amendment.

18 So given that plaintiffs as a pure matter of law,
19 are likely and indeed destined to prevail on the Second
20 Amendment claim.

21 Moving quickly to takings, New Jersey not only
22 prospectively bans these magazines but they require
23 law-abiding citizens who owned them lawfully to either dispose
24 of them or disfigure them by blocking five rounds permanently.
25 And New Jersey does not -- the ban does not provide for any

1 compensation for this destruction of property rights.

2 And the State makes essentially two arguments in
3 response to this. First they say that there's a police power
4 exception to the takings clause, but that is not true. The
5 Supreme Court has expressly and repeatedly rejected that
6 argument. For example in *Loretto*, the court said it's a
7 separate question whether something is within the police power
8 and whether something constitutes a taking.

9 THE COURT: I thought it was one of these cases
10 indicated that the Fifth Amendment there says that the
11 government can't take private property without compensation
12 for public use or something of that nature; but the key was
13 the public use part. You're saying well, they're taking these
14 magazines, but there's no public use for them, so therefore
15 they don't fit within that exception -- or they fit within the
16 requirement, the constitutional requirement.

17 MR. PATTERSON: Well, the court essentially --

18 THE COURT: Am I right on that?

19 MR. PATTERSON: Yes. So the court essentially in
20 *Lucas* dealt with this issue, which is they were saying we need
21 to preserve the beach front, you can't build anything there.
22 So the state -- and the state tried to raise this police power
23 exception; and the court said, you know, any competent
24 attorney for the government can either say this is benefit
25 conferring to the state or harm reducing, and we're not going

1 to have the takings clause turn on the competence of the
2 government's counsel and the arguments they make before a
3 court.

4 And similarly the *Yancey* decision that we cited from
5 the Federal Circuit, was about a quarantine on turkeys. So
6 the state wasn't using the turkeys, but that was still a
7 taking because the proper focus is on the deprivation of
8 property. So here our clients are being deprived of their
9 property in the magazines.

10 And the State's second argument is that sure, one
11 option is that you turn your magazines into the government but
12 you have two other options; you can sell them or expose them
13 lawfully permitted to possess them, or you can permanently
14 alter them so that they only accept 10 rounds rather than more
15 than 10 rounds. But those are no answers.

16 First with respect to the sale option, again,
17 *Loretto* footnote 9 makes abundantly clear, when government
18 appropriates property it doesn't matter if they do it directly
19 or if they direct the property to a third-party, that's still
20 a taking. So the fact that we can transfer our property to a
21 third-party does not affect the analysis of whether a takings
22 has taken place.

23 And then also with respect to the alteration option,
24 the court dealt with this in *Horne*, where there was a program
25 there where the government said to raisin growers you've got

1 to turn over a certain percentage of your crop to us; and the
2 government argued well, they can -- if they don't want to turn
3 those over they can sell their grapes as table grapes or for
4 making wine. And the court said that the government cannot
5 escape its compensation obligation by giving someone an
6 opportunity to retool their property. And so that's exactly
7 what New Jersey is doing here.

8 And then finally moving on to the equal protection
9 clause, your Honor, New Jersey's ban is rendered
10 unconstitutional by the fact that they exempt retired law
11 enforcement officials while banning all other civilians,
12 including veterans of the armed forces, from possessing the
13 banned magazines. And this does not treat like citizens
14 alike. Because it implicates a fundamental right it must pass
15 heightened scrutiny, and it clearly cannot, because there's an
16 obvious less restrictive alternative.

17 And under the Supreme Court's decision in *McCullen*,
18 which is an intermediate scrutiny case, the court said if
19 there are obvious less restrictive alternatives, the state has
20 to try those first before it goes to a drastic remedy like a
21 ban.

22 And here New Jersey justifies the retired law
23 enforcement exception by saying that the law enforcement
24 officials give training. And the training -- but from a
25 declaration the training it looks like is proficiency in the

1 use of firearms, not anything magazine specific.

2 But even putting that to the side the obvious less
3 restrictive alternative is to say okay, if you're a
4 law-abiding citizen there's a training course you can take to
50:14 5 earn an exemption from the ban. And we're not here to concede
6 that would be constitutional, and *McCullen* makes clear that
7 the court there wasn't conceding that the alternatives they
8 propose would be constitutional. But the fact is that there
9 is this alternative that's obviously less restrictive that
50:14 10 would address the issue that the State says that they have,
11 and that demonstrates that the exemption renders the ban
12 unconstitutional.

13 THE COURT: You lost me there. So what are you
14 asking me to do with regard to the retired law enforcement
50:14 15 officers?

16 MR. PATTERSON: We're asking you to strike down the
17 ban, and the Supreme Court's decisions make -- you know, in an
18 equal protection you can either level up or level down and the
19 default is not to make something that is lawful criminal,
50:14 20 which is if you were to strike down the retired law
21 enforcement exception you would be making something the State
22 has decided is not criminal into a crime; versus you strike
23 down the -- you level up so that the person who is being
24 deprived the right is extended to that person.

50:15 25 And since it's an -- you know, if the legislature

1 disagreed with that, assuming that the statute was otherwise
2 constitutional which we could not concede, they could come
3 back and address that so long as everyone was treated equally.
4 But what we're asking for, your Honor, is to strike down the
5 ban on the basis of the equal protection violation.

6 THE COURT: Okay.

7 MR. PATTERSON: And the State has two defenses I'll
8 address very quickly. One they say that retired law
9 enforcement and all other civilian law-abiding citizens
10 including again retired military members are not similarly
11 situated; but the State's argument on that score misses the
12 mark, because the similarly situated analysis, the purpose of
13 it, as the *Shuman* case the State itself cites, is to determine
14 what the basis in law for the distinction is.

15 So for example in the *Shuman* case, they said the
16 plaintiff has to show he's similarly situated, which was what
17 the State quoted; then the next sentence said particularly
18 they have to show in a sex discrimination case that the
19 discrimination is on the basis of sex. So here the point is
20 we have to show that the discrimination is on the basis of
21 your status of if you're a retired law enforcement official or
22 not, and here it's clear in law that that is the basis for the
23 distinction.

24 They raise the training as a justification, but
25 that's not the basis for the distinction in law, the basis is

1 the status and that's demonstrated by the fact that if the
2 law-abiding citizen has the exact same training as a police
3 officer they're not qualified for the exemption. So the
4 reason for the distinction is whether or not you're retired
5 law enforcement --

6 THE COURT: So when you say that a private citizen
7 has the same background as the police officer, you're talking
8 about training in firearms; right?

9 MR. PATTERSON: What I'm saying is that the basis in
10 law for making the distinction is not the amount of training
11 someone has; if you look at the law that's nowhere in the law.
12 What's in the law is are you a retired law enforcement
13 official or not. And if I'm a law-abiding citizen I could go
14 and take those same proficiency courses that the law
15 enforcement officials have to take, and I can't qualify for
16 the exemption. So that makes clear that it's not the training
17 that's the basis in law for making the --

18 THE COURT: So you don't see any distinction between
19 a police officer or a retired police officer, who has spent a
20 substantial amount of time policing, you know, the practice of
21 policing, and handling an emergent situation, you don't see
22 any distinction between that person and a layperson?

23 MR. PATTERSON: Well there's no distinction for
24 purposes of the similarly situated analysis. That distinction
25 your Honor is proposing would go to the justification for the

1 distinction that the State is making, but if you --

2 THE COURT: If you find that the police officer is
3 really not similar to the others, then doesn't that overcome
4 the problem?

00:18 5 MR. PATTERSON: Well, they are similar because the
6 thing that makes them eligible for the exemption is the fact
7 of being a retired police officer. That's the distinction
8 that we're attacking. And the similarly situated analysis
9 asks is that in fact a distinction that the State is making,
00:18 10 and the answer -- and again the *Shuman* case makes that clear
11 in the sex context; is the state in fact distinguishing on the
12 basis of sex. That's the similarly situated inquiry, and we
13 clearly meet that here.

14 Now, you know, the training and the different things
00:19 15 retired police officers may have goes to the justification for
16 it, which would be the -- you know, the actual equal
17 protection analysis. And here the State says rational basis
18 review applies if the law doesn't violate the Second
19 Amendment; but that's wrong because the Supreme Court has said
00:19 20 when a law implicates or affects the exercise of a fundamental
21 right and makes a distinction on that basis, it has to be
22 justified by heightened scrutiny.

23 And so long as these firearms are protected, these
24 magazines are protected by the Second Amendment, which as I've
00:19 25 explained is clear under *Heller*, the distinction implicates

1 the Second Amendment regardless of the outcome of -- if
2 there's a Second Amendment scrutiny analysis.

3 And as I explained before there's no -- you know, if
4 the State's concern really is training, then they could open
5 up a training program for law-abiding citizens to earn an
6 exemption. The fact that it can't be justified by lack of
7 training is made clear by the fact that, you know,
8 retired military veterans are not eligible for the exemption;
9 active security guards who by law have to train continuously
10 do not qualify for the exemption; so it simply cannot meet the
11 standards that it's required to meet.

12 And, you know, those are the reasons why we think we
13 prevail as a matter of law on the merits. In terms of the
14 preliminary injunction, because we believe we're likely to
15 succeed on constitutional claims, it follows that the other
16 factors are met because the violation of constitutional rights
17 is irreparable harm. And when the government is opposing
18 party the other two factors merge and there's no public
19 interest in enforcing an unconstitutional law.

20 So unless your Honor has any questions.

21 THE COURT: No, I'm good. Thank you,

22 MR. PATTERSON: Thank you.

23 THE COURT: Mr. Fanaroff?

24 MR. FANAROFF: Thank you, your Honor. Good

25 afternoon and may it please the Court.

1 Your Honor, while the issues that you are being
2 presented with today are weighty, you are not reviewing them
3 on a blank slate. Not one or two or as counsel indicated
4 four, but it's actually five Circuit Courts of Appeal have
5 considered substantially similar legal arguments, the ones
6 raised by the plaintiffs challenging substantially similar
7 laws from the District of Columbia all the way to California,
8 and in every case the arguments plaintiffs are raising here
9 today have been rejected.

10 And while your Honor is not obligated to simply
11 follow the decisions of sister Circuits, it is important to
12 note that while they speak with one voice in upholding LCM
13 restrictions, they arrived at their conclusions using separate
14 but equally compelling legal rationales.

15 In other words, for the plaintiffs to show that they
16 have a likelihood of success on the merits, your Honor would
17 have to not only reject the collective conclusions of five
18 Circuit Courts of Appeals, but at least three distinguishable
19 legal justifications for the conclusions they reached.

20 Each decision and the legal basis underlying it,
21 provides its own independent basis for denying plaintiffs'
22 request for a preliminary injunction. But you must find that
23 all of those cases were decide incorrectly in order to grant
24 the preliminary injunction.

25 Nothing in this record, which again is substantially

1 similar to the records in other cases challenging LCM
2 restrictions, suggests much less requires a ruling contrary to
3 the recent decisions of the Second, Fourth, Seventh, Ninth and
4 DC Circuit Courts of Appeal.

00:22 5 Now, at the outset opposing counsel made what is
6 really an extraordinary argument. He basically said that the
7 common use test prevails over every other consideration that
8 your Honor would look at with regard to the Second Amendment.
9 And not only does *Heller* not stand for that proposition, but
00:23 10 that broad reading of that case would have potentially serious
11 ramifications.

12 Now, of course the common use test been looked at in
13 other situations. Opposing counsel's primary argument is that
14 there's 133 million of these things in circulation therefore
00:23 15 they must in common use, but -- and I know we're going to be
16 taking further testimony about this; the evidence indicates
17 that the majority of guns are owned by a minority of gun
18 owners. And moreover, there's no indication that these LCMs
19 are widely owned, much less possessed by most of these gun
00:23 20 owners.

21 In fact, three Circuit Courts of Appeal that looked
22 at this sort of common use argument said that evidence of
23 common use was "allusive", that was the Second Circuit in the
24 *New York State Rifle & Pistol Association case*; in *Fyock* which
00:24 25 was the Ninth Circuit case, they said that it does not

1 necessarily show that LCMs are in common use; and also the *San*
2 *Francisco Veterans Police Officers* case noted that there was
3 no showing that there was common or prevalent ownership, just
4 that a large number of these LCMs had been sold. There's
5 nothing in the complaint that indicates nationwide much less
6 in New Jersey that LCMs are in common use.

7 And of course what opposing counsel also did was
8 read out of the rest of the *Heller* decision important
9 limitations that the Supreme Court put on the Second Amendment
10 right. Specifically the fact that there's nothing that
11 prohibits the restriction on dangerous and unusual weapons or
12 on weapons that are most appropriately used in the military
13 setting. And of course those were issues that the Circuit
14 Courts of Appeal that have looked at these LCM restrictions
15 also considered.

16 Now with regard to the dangerous and unusual it's
17 sort of the other side of the coin to common use. What
18 opposing counsel cannot show you is any situation where an
19 LCMs was necessary for that fundamental right that was
20 recognized in *Heller*, which is defense of the hearth and home
21 with the handgun.

22 What the evidence does indicate however, is that
23 LCMs are overwhelmingly used in mass shootings, they're
24 overwhelmingly used in situations where more ammunition is
25 fired, more people are injured, and people who are potential

1 victims of gun violence have less of a chance to flee from
2 those circumstances, because shooters are using those LCMs.

3 Our declarants have indicated that more than half of
4 the mass shootings that have occurred in the country in the
5 past few decades implicate at least one LCM, and in fact your
6 Honor's probably well aware that a mass shooting that -- well
7 it's not defined as a mass shooting because not enough people
8 died, this is a paradox of the terminology, but 17 people were
9 injured at a shooting event in Trenton less than a mile from
10 this courthouse less than a month ago.

11 THE COURT: That's a good example, and I understand
12 your facts with regard to the magazines. But on the other
13 hand, just knowing a little bit about that case, it was
14 reported that the individual was incarcerated for a period of
15 years and was subject to solitary confinement for a number of
16 years. So as I understand it there were some mental handicap
17 issues with regard to that individual.

18 So where do you put the importance, on the magazine
19 or on the mental ability of the person that's firing? I don't
20 how that helps you or hurts you to tell you the truth.

21 MR. FANAROFF: Your Honor --

22 THE COURT: It presents an issue I believe.

23 MR. FANAROFF: Forgive me for interrupting, your
24 Honor. I think the point here is that when magazines have
25 fewer rounds of ammunition in them, fewer rounds are going to

1 be fired by a law breaker when they are engaging in that type
2 of activity. And again the declarants indicate and other
3 cases that have looked at these restrictions have shown that
4 that pause when someone has to reload is very critical, not
5 just for potential victims who can try to get to safety, but
6 also for law enforcement officers who are risking their lives
7 to engage with those individuals.

8 And I should also note, your Honor, that one of the
9 other findings from the research is that these LCMs are also
10 used in somewhere between one-third up to one-half of attacks
11 on law enforcement. So the fact that these are out there
12 where we have police officers who are risking their lives to
13 protect us certainly is another consideration.

14 But again, just to go back to this issue of
15 dangerous and unusual, your Honor, the other aspect of this
16 that is absent during the plaintiffs' pleadings, and again
17 this goes to the question of whether or not they're unusual,
18 is the fact that self-defense which is again everything -- we
19 all agree that is the core right, self-defenders report that
20 they fire fewer than three bullets in self-defense when they
21 are -- when they are utilizing their firearms to protect
22 themselves.

23 In fact most of the times that individuals use their
24 firearms to ward off assailants, merely brandishing the gun is
25 sufficient for that purpose. And indeed one of the plaintiffs

1 in this case illustrates that point where he brandished a gun
2 when there were intruders in his home, he didn't fire a single
3 shot.

4 The *Kolbe* majority did identify, your Honor, the
5 fact that LCMs are most appropriate for military use. Sort of
6 the same side of the coin of whether something is dangerous
7 and unusual, there's a lengthy discussion about the historical
8 antecedents of M-16s and AR-15s and how those are basically
9 produced in the 1960s and a more efficient firearm for our
10 military; and the AR-15 of course being the civilian version
11 of the M-16.

12 But these large capacity magazines were not intended
13 to be utilized in the civilian capacity, and in fact until the
14 1980s most of the handguns that were sold in the United States
15 of America were the so-called six-shooter. That was also the
16 typical sidearm that was used by law enforcement, and in fact
17 the sidearm that was issued by the U.S. Army until 1986 was
18 the seven-round M1911, it had a seven-round magazine.

19 So the *Kolbe* court identified the fact that LCMs and
20 weapons like the AR-15 are dangerous and unusual, they are
21 utilized primarily in the military, which is one of three
22 different rationales that Courts of Appeal have utilized in
23 terms of upholding these restrictions. And again opposing
24 counsel would have your Honor ignore all of those different
25 rationales by merely saying something is in common use

1 therefore there can be no restriction.

2 And as was discussed by Judge Easterbrook in the
3 Seventh Circuit *Friedman* case, you simply cannot -- a law's
4 existence can't be the source of its own constitutional
5 validity. So these arguments again are not being presented to
6 you on a blank slate, your Honor, judges across the country
7 have looked at these issues and have rejected the arguments
8 like common use above all else; which parenthetically holds no
9 majority opinion at the Supreme Court either for that
10 decision.

11 Now of course the grant of a preliminary injunction
12 in any case is an extraordinary remedy that the moving party
13 must carry the burden in meeting, but that obligation was
14 enhanced even more, your Honor, where as here the plaintiffs
15 are asking this Court to block implementation of a duly
16 enacted law which carries with it the presumption of validity.

17 And without simply repeating the arguments that have
18 been made in our brief, it is enough to point out that LCMs
19 have been found to be outside the protections afforded by the
20 Second Amendment which we discussed in *Kolbe*; that they were
21 not in common use at the time of the ratification of the
22 Second Amendment; and also that provided law-abiding gun
23 owners were given an alternative means of self-defense an LCM
24 restriction was appropriate, that was *Friedman*.

25 And even assuming LCMs laws infringed on the rights

1 afforded under the Second Amendment they are a constitutional
2 means of addressing a substantial governmental interest in
3 public safety, and that's *Fyock Heller II* and *New York State*.

4 And again the intermediate scrutiny standard that
5 those three Courts of Appeal utilized, opposing counsel would
6 get rid of those entirely because his argument is that
7 provided common use can be shown, no restriction is
8 appropriate. And that's just simply -- there's no support for
9 that in any of the five Circuit Courts of Appeal that have
10 looked at this case.

11 I would just note also, because they didn't talk
12 about it your Honor I just want to touch briefly on
13 intermediate scrutiny because I think plaintiffs would concede
14 I don't know they argue this seriously in their papers, that
15 protecting the public safety is not a substantial interest of
16 the government; that was recognized certainly in *Drake* and the
17 Third Circuit Court of Appeals.

18 So really the only two questions, your Honor, is
19 whether or not the LCM restriction is a reasonable fit, and
20 whether or not it impedes more conduct than is necessary. And
21 on the first account the answer to that is yes and on the
22 second it is no.

23 Again, courts that have looked at these restrictions
24 have found based on, as I said before and I won't repeat the
25 argument, the extensive research and tragic recent history

1 that involves large capacity magazines being used in mass
2 shootings; there are studies that have shown that LCM
3 restrictions are one of the most effective ways to reduce gun
4 violence. In fact once study raises the very simple question
5 of I will tell you the rate of mass shootings in a state if
6 you tell me whether or not that state has an LCM restriction.

7 There is a clear nexus between the substantial
8 interest in public safety, and the reasonably fit of
9 restricting an LCM from 15 rounds down to 10, which was
10 another point that opposing counsel raised. And I just wanted
11 to mention rhetorically; would it have been okay if we had a
12 30-round limit but are not dropping it down to 10 but for some
13 reason going from 15 to 10 is inappropriate. It just doesn't
14 make sense, your Honor.

15 And if anything what we were doing is moving our
16 state into line with other states that have recently enacted
17 LCM restrictions. And in that way as we discussed in our
18 brief it reduces the likelihood that individuals will be able
19 to purchase them, that is large capacity magazines, at all.

20 And in addition, to say that there's no evidence
21 that it matters is belied by the fact -- and I believe it is
22 in the Every Town For Gun Safety amicus brief that cited the
23 fact that a young victim of gun violence was killed as the
24 brief put it I believe by the 12th round in a magazine. So
25 there is a difference between having 15 rounds and 10.

1 THE COURT: But that one incident -- you know, I'm
2 very sensitive to gun violence, but on the other hand, that's
3 anecdotal as opposed to the huge study about magazine usage.
4 How does the Court handle anecdotes versus concerns about the
5 safety of large magazines?

6 MR. FANAROFF: Sure. I mean, your Honor, with due
7 respect if you're concerned about anecdotes I would just point
8 out the fact that plaintiffs cannot point to a single
9 situation in the entire United States of America where a large
10 capacity magazine was necessary for a self-defender to
11 properly defend themselves. Obviously we are not banning all
12 handguns --

13 THE COURT: There was some expert that said the
14 large capacity magazines provided law enforcement and others
15 with a sufficient firepower, that they didn't have to stop to
16 change their magazine, so it provided additional safety. I
17 read all those briefs and documents over the last couple of
18 days, so I'm not sure my facts are a hundred percent clear or
19 I'm expressing it perfectly, but that was in there.

20 MR. FANAROFF: Right. And your Honor I think that
21 we have to understand that we invest in law enforcement a
22 different responsibility when they're carrying firearms than
23 we do ordinary citizens, and indeed just as an illustration
24 there are certain weapons that civilians cannot possess in the
25 State of New Jersey that law enforcement is permitted and

1 utilizes as part of their law enforcement mission.

2 So, I don't think there's any tension between saying
3 that law enforcement has a different role to play when they're
4 utilizing firearms than somebody who's engaging in

5 self-defense. But again, we are number one not precluding
6 law-abiding citizens from purchasing weapons that have
7 magazines of up to 10 rounds; we are not prohibiting them from
8 purchasing a certain number of those weapons, they purchase as
9 many of them as they want, in addition to purchasing as many

10 10-round magazines as they want. The issue and the question
11 is whether or not New Jerseyans are provided a continuing
12 right to defend themselves in a way that is sufficient; that
13 is clearly the case here because they are purchase as many
14 firearms as they want and as many magazines as they want for
15 that purpose. At *Fyock* put it, it only limits a subset of
16 magazines, not an entire class of arms which is what --

17 THE COURT: If I can just change the subject a
18 little bit, what about the taking part?

19 MR. FANAROFF: So we obviously have a different view
20 than opposing counsel about his representations as to whether
21 or not the state can in an exercise of its police power engage
22 in this type of activity. The *Wiese* court, which looked at
23 this case similarly, concluded that it was not a violation of
24 the takings clause, as did *Rupp* which is another of -- the
25 district courts in California have been very active in terms

1 of interpreting various case law.

2 And I just will quote it directly from *Rupp*, your
3 Honor, which is cited in our brief: "Legislation pursuant to
4 the police power generally is not a taking, but there are
5 exceptions under limited circumstances such as where land will
6 no longer have any economically valuable use." This is not
7 that situation, this is a situation where something that our
8 legislature has deemed dangerous is going to be taken out of
9 commission, but again it doesn't preclude individuals who own
10 these large capacity magazines from transferring or selling
11 them from individuals who are lawfully permitted to possess
12 them, or from modifying them in a way that reduces their
13 capacity from 15 rounds down to 10.

14 I would just -- again I don't want to repeat all of
15 the arguments in our brief on the takings clause your Honor, I
16 think we fleshed out those arguments robustly in our papers.
17 And if your Honor would permit me I just wanted to close the
18 loop on the intermediate scrutiny standard with regard to the
19 Second Amendment.

20 The other aspect of it is the question of whether or
21 not it burdens more conduct than necessary. And as I
22 mentioned, there are multiple alternative channels for
23 self-defense, and I should also note that the legislation
24 exempts firearms with a fixed magazine capacity of 15 rounds,
25 and it also exempts firearms with detachable magazines of

1 15-round that cannot be converted to accept a smaller
2 ammunition clip. Those are identical to exemptions that were
3 included in the City of Sunnyvale's prohibition that was
4 upheld in *Fyock*.

00:39 5 And so when you put these issues all together, your
6 Honor, you are offered with multiple avenues through which the
7 LCM restriction could be upheld. But putting that to the
8 side, it's important to note the standard that's before you as
9 you know is whether or not the plaintiffs have met their
00:39 10 burden of showing that they have a substantial likelihood of
11 success on the merits; and I would argue to you, your Honor,
12 that the five Circuit Courts of Appeals that have looked at
13 this would certainly argue in the negative on that question.

14 Then finally, your Honor, very briefly, I just
00:40 15 wanted to touch on the equal protection argument, because I
16 thought it was interesting the use of the word could was
17 thrown around by opposing counsel in several situations; they
18 could get these -- regular citizens could get certain
19 certifications; there could be this training program for
00:40 20 people who wanted to get the certification. But the point
21 here on rationale basis standard is not whether a legislature
22 could or couldn't do something or should or shouldn't do
23 something, it's whether or not they've drawn a rational basis
24 for their actions.

00:40 25 And again I don't want to repeat everything we said

1 in our briefs, but one important distinction other than the
2 fact that people have to be similarly situated, and again I
3 will if the Court will indulge me, just quote from our brief
4 on this point. "They have to be similarly situated when they
5 are like in all relevant respects."

6 And one of the key distinctions here is that law
7 enforcement has to go through twice-a-year certification
8 training on firearms. That is not only while they're active
9 duty, but also while they're retired so that they can carry
10 their firearm, which is as separate issue entirely because in
11 the State of New Jersey civilians generally are prohibited
12 from carrying firearms in public. That was a separate
13 argument that occurred in *Drake v. Filco* which discussed that
14 point.

15 And so law enforcement is not similarly situated to
16 the average law-abiding gun owner in the State of New Jersey;
17 not just because they have to go through twice-a-year
18 certification on their use of firearms, but also they have to
19 continue doing that after they retire so that they can
20 continue availing themselves of that benefit that is not
21 extended to other members of the public.

22 So your Honor, when you get to the other three
23 element involved in preliminary injunction, once a
24 determination is made that no constitutional right is
25 infringed, the rest of the elements fall away. There's

1 obviously no concern over irreparable harm because if there's
2 no injury there's no harm.

3 But moreover, your Honor, as we mentioned in our
4 brief, firearms owners have until December to dispossess
5 themselves of these LCMs, so the need for a preliminary
6 injunction in July or even in August when we are again before
7 you is minimized.

8 Secondly, with regard to the balancing of the
9 equities, obviously this was a law that was put into place by
10 the peoples' elected representatives. There's discussion in
11 both the Seventh Circuit and the Second Circuit cases by Judge
12 Easterbrook -- excuse me, in the Fourth Circuit in Judge
13 Wilkinson, who both spoke to the fact that courts are not in
14 as good a position as the legislature to make these types of
15 decisions as it relates to important issues such as whether or
16 not large capacity magazines should be restricted or not.

17 And then finally, your Honor, the harm obviously
18 would be far greater to the defendants and to the people of
19 New Jersey, who elected their legislators, the legislators
20 speak for the people and have determined that it is an
21 appropriate exercise to restrict these large capacity
22 magazines in the interest of protecting the public safety.
23 And for all of those reasons your Honor we think that a
24 preliminary injunction should be denied.

25 And if you had any other questions your Honor I'd be

1 happy to answer them.

2 THE COURT: No, no, I'm satisfied with what you've
3 stated. My point in going to this hearing is that I think
4 that the evidence from the experts is different on both sides,
5 and it needs to be fleshed out somehow, and the best way to do
6 it is to have them come and testify so we can explore their
7 credibility, and how broadly they define their underlying
8 statements about the use of magazines, when they're used, how
9 they're used, how many of used and things of that nature.

10 So I appreciate all the oral argument, but quite
11 frankly I think it's a pretty intense factual inquiry that we
12 have to do.

13 MR. FANAROFF: Thank you, your Honor.

14 THE COURT: Thank you.

15 So both side have had their opportunity; are there
16 any other matters you wish to do today?

17 MR. THOMPSON: Nothing further for the plaintiffs,
18 your Honor.

19 MR. FANAROFF: Nothing further, your Honor.

20 THE COURT: All right. So we'll adjourn until
21 August 13th.

22 I wish to make one note; today we had a call, I
23 don't even know who it was from, but it was a person within
24 the media, and they wished to either provide television
25 coverage or to tape the oral argument and things of that

1 nature. And generally the answer to that is no.

2 But we do have certain rules. One is Local Rule
3 401.1, we have local Rule 501.1, and quite frankly if anyone
4 wishes to object to that ruling and wishes to be heard on
5 that, all you have to do is write a letter and I'll place it
6 on the calendar and we'll go through those issues. So anyone
7 that wishes to do so. It's not just the lawyers that are
8 here, but it's any of you folks that are listening in.

9 Any other issues?

10 MR. JONES: Your Honor, before we adjourn, I just
11 want a point of clarification on the dates of the hearing; in
12 chambers I thought we had discussed the 13th, the 16th and the
13 17th, but from the bench I believe your Honor said the 13th,
14 the 14th and the 17th. Is that what we're talking about?

15 THE COURT: Well, we'll issue an order, but I'm
16 pretty sure it's the 13th, 16th -- it's Thursday and Friday,
17 Monday, Thursday, Friday.

18 MR. JONES: Thank you.

19 THE COURT: Any other issues? All right. Thank you
20 for coming in today.

21 (Matter concluded.)

22

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